No. 80-1235

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHEARN MOODY, JR.,
Petitioner,

vs.

THARPE FORRESTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,
Respondent,

SHEARN MOODY, JR.,
Petitioner,

vs.

PROTECTIVE LIFE INSURANCE COMPANY,
Respondent.

JOINT RESPONSE IN OPPOSITION TO MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

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JOINT RESPONSE IN OPPOSITION TO MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

This joint response is filed on behalf of Respondents, Protective Life Insurance Company ("Protective") and Tharpe Forrester, Commissioner of Insurance of the State of Alabama, as Receiver of Empire Life Insurance Company of America ("Empire Receiver"). This joint response of Protective and the Empire Receiver is made in opposition to the motion of the Washington Legal Foundation ("WLF") for leave to file a brief *amicus curiae* in support of the pending petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Petitioner is Shearn Moody, Jr. ("Moody").

1. The motion and brief filed by WLF are not accompanied by written consent of Protective and the Empire Receiver, as is contemplated by Rule 36.1 of the Rules of the Supreme Court of the United States. Contrary to the assertion in the WLF motion, counsel for Protective was not contacted concerning the filing of the WLF motion and brief.

2. Rule 36.1 provides, in pertinent part, that "a motion for leave to file such a brief when consent has been refused is not favored." Protective and the Empire Receiver hereby refuse consent.

3. The motion and brief of WLF falsely state that Willie Allmon's interests are at state. (WLF motion at *iii;* WLF brief at 3, 12).

4. Contrary to assertions in the WLF brief, Willie Allmon's involvement in the *Allmon* litigation was not adversely affected by the injunction of the Alabama Receivership Court which is sought to be challenged by the instant petition.

5. The proposed brief of WLF totally distorts the proceedings in *Willie Allmon* v. *John G. Bookout, et al.,* Civil Action No. 74-377-N (M.D. Ala)., *on appeal* No. 75-2104 (5th Cir.). Protective and the Empire Receiver were parties defendant in the *Allmon* litigation, which was pending in the United States District Court for the Middle District of Alabama in 1975 and, on remand from the United States Circuit Court of Appeals for the Fifth Circuit, in 1976. The following matters of record dispel the distortion attempted by WLF and Moody:

(a) By decree entered June 14, 1974, the Alabama Receivership Court authorized and directed the Empire Receiver to accept and execute a reinsurance agreement with Protective. This decree also ordered the Empire Receiver to proceed with liquidation of Empire. (Appendix A).

(b) The amended complaint in *Allmon* sought a federal-court injunction to prevent liquidation of Empire and to prevent the

Empire Receiver and Protective from taking any steps to consummate the reinsurance agreement. The amended complaint also sought a declaration by the federal court that any action taken in the Alabama Receivership Court was null and void. (Appendix B).

(c) On April 24, 1975, the federal district court in *Allmon* granted summary judgment in favor of the Empire Receiver, Protective, and others. (Appendix C). In its memorandum opinnion of the same date, the federal district court construed the *Allmon* amended complaint as follows:

> "Effectively what the Plaintiff would have this Court do would be to assert omnipotent power and to wrest control of the receivership estate from a State Court of competent jurisdiction, thereby materially disrupting if not destroying the orderly function and execution of the State Court and its procedures.
>
> (Appendix D, at A-10)

(d) The same day that the federal district court in *Allmon* granted summary judgment in favor of the Empire Receiver and Protective, notice of appeal to the United States Court of Appeals for the Fifth Circuit was filed. (Appendix E). Also on the same day, a motion for injunction pending appeal was served. The motion sought an injunction from the federal appellate court prohibiting Protective and the Empire Receiver from taking any steps to consummate the reinsurance agreement "or from making any disposition in any way of any assets" of Empire. On April 28, 1975, a panel of the Fifth Circuit (Circuit Judges Coleman, Ainsworth and Simpson) denied the motion for injunction.

(e) On May 5, 1975, Moody's attorneys who purported to represent Allmon served a "Motion for Protective Order and Motion for Injunction Pending Expedited Appeal." This motion also sought "[a]n injunctive order, pending resolution of

[Allmon's] appeal... restraining [Protective, the Empire Receiver and others] from taking any further steps to execute or consummate [the reinsurance agreement] in any and all of its aspects...." This motion specifically relied on the case of *Donovan* v. *City of Dallas,* 377 U.S. 408 (1954). On May 7, 1975, the Fifth Circuit denied Allmon's motion to expedite appeal and denied Allmon's motion for injunction pending expedited appeal. (Appendix F).

(f) During the course of Allmon's appeal to the Fifth Circuit, Willie Allmon voluntarily terminated his status as an Empire policyholder and, accordingly, Protective and the Empire Receiver sought dismissal of the appeal on grounds of mootness. See Appendix G (copy of Protective's motion to dismiss the *Allmon* appeal).

(g) By order dated November 18, 1975, the Fifth Circuit vacated the appeal and remanded the cause to the district court for appropriate findings of fact and conclusions of law, after an adversary hearing, as to whether the appeal had been mooted. (Appendix H).

(h) On remand, attorneys for Allmon and Moody sought "protection" in the federal district court from the January 6, 1975 injunction of the Alabama Receivership Court. The federal district court denied "protection." (Appendix I).

(i) The federal district court expressly noted that the Alabama Receivership Court had modified the injunction, by order entered December 16, 1975 "which stated that no action will be taken to interfere with Willie Allmon's active and full participation in the proceedings on the mootness question." (Appendix I, at A-24).

(j) The federal district court also noted that the Alabama Supreme Court had affirmed the January 6, 1975 injunction. *(Id.)*

(k) The federal district court expressly held that the case of *Donovan* v. *City of Dallas* was inapposite. (Appendix I, at A-27 - A-28).

(l) On May 14, 1976, an evidentiary hearing was conducted by the federal district court. Protective offered testimony of two witnesses and a number of documentary exhibits. The Empire Receiver adopted Protective's evidence. Allmon offered no evidence, but his counsel did cross-examine Protective's witnesses. On June 28, 1976, the federal district court entered final judgment dismissing the *Allmon* action. The judgment of the district court, together with its memorandum opinion incorporating its findings of fact and conclusions of law, are attached as Appendix J. The federal district court concluded, in pertinent part, that Willie Allmon had not been injured or damaged in any way by the receivership proceedings and that Allmon had intentionally and voluntarily surrendered his Empire policy. No appellate review of the dismissal of the *Allmon* action was sought by any party.

6. Contrary to assertions in the WLF brief, Moody has engaged in vexatious and harassing litigation, which resulted in explicit findings by the Alabama Receivership Court and the Alabama Supreme Court. *E.g. Moody* v. *State ex rel. Payne,* 329 So.2d 73, 75-77 (S. Ct. Ala. 1976).

7.The WLF contends in brief that the Alabama Receivership Court's injunction against Moody was overly broad. The Alabama Supreme Court expressly rejected this argument over five years ago on Moody's unsuccessful appeal from the injunction. 329 So.2d at 78-79.

8. In further response, Protective and the Empire Receiver hereby incorporate by reference their joint brief in opposition to Moody's petition for writ of certiorari.

9. The petition for writ of certiorari and the proposed brief of WLF in support thereof are frivolous. This Court should award respondents appropriate damages under Rule 49.

Respectfully submitted,

WILLIAM A. ROBINSON
(Attorney of Record)
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Counsel for Respondent, Protective Life Insurance Company.

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(205) 834-3176

Counsel for Respondent, The Commissioner of Insurance of the State of Alabama, as Receiver for Empire Life Insurance Company of America.

Proof of Service

Proof of service of three copies of Respondents' Joint Response in Opposition to Motion of the Washington Legal Foundation for Leave to File a Brief *Amicus Curiae*, upon all parties separately represented by counsel, was filed by William A. Robinson, a member of the bar of the United States Supreme Court, with the clerk of the United States Supreme Court on the same date the joint response in opposition was filed.

APPENDIX

APPENDIX A

CIRCUIT COURT, TENTH JUDICIAL
CIRCUIT OF ALABAMA
EQUITY DIVISION

CIVIL ACTION NO. 171-687

State of Alabama
Ex Rel John G. Bookout
Commissioner of Insurance
Plaintiff

vs.

Empire Life Insurance
Company of America, An
Alabama Corporation
Defendant

and

Shearn Moody, Jr.
Intervenor

DECREE AUTHORIZING RECEIVER TO ACCEPT PROPOSAL FOR REINSURANCE AND TO PROCEED WITH LIQUIDATION

This case came on for hearing on the Receiver's petition to reinsure the business of Empire Life Insurance Company of America, an Alabama corporation, and liquidate its assets and on related pleadings. Voluminous documentary evidence and oral testimony were presented to the Court at a ten-day hearing on the petition. On the basis of the evidence adduced at that hearing, the Court finds and concludes as follows:

1. Empire is, and at all times since the filing of this delinquency proceeding has been, both impaired and insolvent. At the time of the hearing, Empire was impaired in excess of $10,000,000 and insolvent in excess of $6,000,000.

2. John G. Bookout, Commissioner of Insurance, State of Alabama, has duly determined that further efforts to rehabilitate Empire would be useless, and on the basis of the evidence, the Court agrees with said determination.

3. It is in the best interest of the policyholders of Empire for Empire's business in force to be reinsured by a reputable and solvent insurance company and for its assets to be liquidated; the interests of said policyholders cannot be reasonably secured and protected in the absence of such reinsurance.

4. Neither the Intervenor, Shearn Moody, Jr., nor any other stockholder has submitted any plan of rehabilitation which would not present substantial and undue risk to the policyholders.

5. Protective Life Insurance Company, an Alabama corporation established in 1907, has a combined capital and surplus in excess of $25,000,000. Protective is a party to this action as an Intervenor. The Protective proposal has been recommended and endorsed by the Alabama Commissioner of Insurance and the commissioners of all other states centrally concerned with the affairs of Empire. Of the proposals for reinsurance submitted in response to the Receiver's solicitation, that of Protective, as amended, best protects the interests of Empire's policyholders. The Protective proposal, as amended, is fair, reasonable, non-discriminatory, responsive to the solicitation authorized by the Court, and fully in accordance with all applicable law.

6. Contrary to the claim of Moody, there is no evidence of any wrongful or improper action or conspiracy on the part of Protective or any of its officers or agents in connection with the

Protective proposal, in connection with recommendation of the proposal to the Court by the Receiver, by any other commissioner or by any witness, or in connection with any other aspect of this proceeding.

7. Moody also contends that the Receiver mismanaged Empire's affairs during the period of the receivership. This claim must be rejected. The Court finds that the Receiver in no respect mismanaged Empire's affairs or contributed detrimentally to its present condition, but rather the Receiver faithfully performed his duties in accordance with Alabama law and the orders of this Court.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

ONE: That the Receiver be and hereby is authorized and directed to accept and execute the Protective proposal as amended so that it shall become a binding contract, and to perform each and all of his covenants thereunder.

TWO: That the Receiver proceed with the orderly liquidation of the affairs of Empire.

THREE: That the Receiver proceed under this order subject to further review and order by and of this Court.

DONE and ORDERED this 14th day of June, 1974.

Wm. C. Barber

Circuit Judge In Equity Sitting

APPENDIX B

Excerpt From Amended Complaint

* * *

WHEREFORE, Plaintiff demands judgment on behalf of himself, and the class he represents as follows:

I. That this court certify this action as a class action on behalf of all persons who presently hold or own Empire Special Executive plan life insurance policies.

II. That this court convene a statutory court of three judges pursuant to Title 28 U.S.C. Section 2284 for the purpose of hearing and determining the cause.

III. That this court adjuge and declare Section 623 and Section 631 of Title 28A of the Code of Alabama in violation of the Constitution of the United States.

IV. That this court issue a temporary and permanent injunction: 1) restraining and preventing defendants, their agents, servants and employees, and all other persons who receive actual notice of the order of this court from enforcing, executing, administering, or in any other manner giving effect to the provisions of Section 623 and Section 631 of Title 28A of the Code of Alabama, 2) restraining and preventing defendants, their agents, servants and employees, and all other persons who receive actual notice of the order of this court from liquidating Empire and from enforcing the Treaty of Assumption and Bulk Reinsurance between Bookout and Protective, from taking any further steps to consummate said Treaty of Assumption and Bulk Reinsurance, and from enforcing or carrying out any order, judgment, or decree entered in the circuit for the 10th Judicial Circuit of Alabama in Case No. 171-687 captioned *Alabama ex rel Bookout* v. *Empire.*

V. That this court declare that any action taken in the aforementioned case captioned *Alabama ex rel Bookout* v. *Em-*

pire is null and void, and that no party to this proceeding or anyone else getting actual notice of the order of this court proceed with an insolvency proceeding against Empire unless every policyholder of Empire be given personal notice or notice by mail of said proceeding.

VI. In the alternative to injunctive relief, that this court enter a judgment against defendants, and each of them, jointly and severally, in the sum of $40,000,000.00, said sum being intended to be the total value of the assets which the defendants are about to wrongfully transfer from Empire to Protective.

VII. That this court grant plaintiff's attorneys' fees, and such other, further, and different relief as is just, together with the costs and disbursements of this action.

Dated: Birmingham, Alabama
January 27, 1975.

Collins and Johnston
1401 City Federal Building
Birmingham, Alabama 35203

Dale R. Major
3217 Montrose
Houston, Texas 77002

Saxe, Bacon, Bolan & Manley
39 East 68th Street
New York, New York 10021

By: /s/ Scott E. Manley

Affidavit of Service

State of Texas

SS:

County of Galveston

SCOTT E. MANLEY, being duly sworn, deposes and says:

I hereby certify that I am one of the Attorneys of Record for the Plaintiff and that I have this date served a copy of the above and foregoing Amended Complaint on James W. Webb and Edwin K. Livingston, Attorneys of Record for Defendant John G. Bookout, Individually and as Receiver of Empire Life Insurance Company of America, and on Drayton Nabers, Jr. and Cabaniss, Johnston, Gardner & Clark, Attorneys of Record for Defendant Protective Life Insurance Company, by placing a copy of same in the United States mail, postage prepaid at their respective office addresses:

James W. Webb, Esq., 138 Adams Avenue, Montgomery, Alabama 36104;

Edwin K. Livingston, Esq., 30 South Perry Street, Montgomery, Alabama 36104;

Drayton Nabers, Jr., Esq., Cabaniss, Johnston, Gardner & Clark, Flirst National-Southern Natural Bldg., Birmingham, Alabama 35203.

Done this 28th day of January, 1975.

/s/ Scott E. Manley
Saxe, Bacon, Bolan & Manley
39 East 68th Street
New York, New York 10021
BY: Scott E. Manley

Sworn to before me this
28th day of January, 1975.
Wilma Hindry

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 74-377-N

Willie Allmon,
Plaintiff,

v.

John G. Bookout; *et al.*,
Defendants.

SUMMARY JUDGMENT

In accordance with the memorandum opinion entered by this Court in this case on April 24, 1975, it is the

ORDER, JUDGMENT and DECREE of this Court that summary judgment be, and the same is hereby, entered for the Defendants in the above-styled cause; that the Plaintiff take nothing by this suit; and that the costs of this proceeding be taxed against the Plaintiff and Intervening Plaintiff.

DONE this 24th day of April, 1975.

R. E. Varner
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
Civil Action No. 74-377-N

Willie Allmon,
Plaintiff,

v.

John G. Bookout, *et al.*,
Defendants.

MEMORANDUM OPINION

This cause is now before the Court on the various Defendants' motions to dismiss and motions for summary judgment. It is the opinion of this Court that this case does not warrant the empaneling of a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284. Accordingly, the Plaintiff's request for such is hereby denied. It is further ORDERED that the motion of John S. Bleker, Jr., for intervention filed herein February 10, 1975, be, and the same is hereby, granted.

The threshold issue which these motions place before the Court deals with this Court's jurisdiction to entertain this suit.

The pleadings in this case in which the named Plaintiff is a stockholder of an insurance company that has been declared in receivership by the Circuit Court of Jefferson County, Alabama, pursuant to Code of Alabama, Title 28A, §§ 620-655, indicate that *inter alia* jurisdiction is based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).[1] The Defendants herein have stressed

---

[1] There is some question as to jurisdiction herein based on the lack of the requisite jurisdictional amount as is required by 28 U.S.C. §§ 1331 and 1332. In view of the Court's finding with regard to 28 U.S.C. § 1343(3), it is unnecessary to reach this point.

the point that no jurisdiction exists in this case because of the absence of the requisite jurisdictional amount. The Plaintiff, on the other hand, insists that he has stated a cause of action under § 1343(3) since no jurisdictional amount is required under that section.

Basically, 28 U.S.C. § 1343(3) is the jurisdictional counterpart to 42 U.S.C. § 1983. While the language in subsection (3) of § 1343 refers to "equal rights",[2] such language is apparently not meant to limit the subsection's scope to equal protection claims alone.[3] Indeed, the courts have uniformly held that no jurisdictional amount is required when jurisdiction of a due process claim, as herein, is founded on § 1343(3). *Douglas* v. *City of Jeannette,* 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943); *Lynch* v. *Household Finance Corp., supra; Gibson* v. *Berryhill,* 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973); *Walton* v. *City of Atlanta,* 181 F.2d 693 (5th Cir. 1950), *cert. den.* 340 U.S. 823 (1950); *Doe* v. *Lukhard,* 363 F.Supp. 823 (ED Va. 1973), *affm'd.* 493 F.2d 54 (4th Cir. 1974).

The plaintiff having complied with the technical requirements of jurisdiction, it becomes incumbent upon this Court to look beyond these technicalities to the practicalities and effects of the maintenance of this suit in which the jurisdiction sought to be invoked is substantially the same as that previously vested and presently existing in the Alabama State Court.

---

[2]Section 1343(3) states as follows: "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for *equal rights* of citizens or of all persons within the jurisdiction of the United States." (emphasis added)

[3] *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), indicates that this language is merely a remnant of a previously abolished statute and has never been construed to so limit § 1343(3). See footnote 7, 405 U.S. at 543.

The jurisdiction vested in the Alabama State Court undeniably authorizes that Court to direct the disposition and distribution of receivership property, control of which is essential in order to effectuate the exercise of the State Court's jurisdiction. Plaintiff seeks, through charges of bias, impropriety, and the State receivership statute's unconstitutionality[4], to enjoin the disposition of the receivership's property and to secure an award of a sum of money based solely on the value of the assets of the receivership estate. Effectively what the Plaintiff would have this Court do would be to assert omnipotent power and to wrest control of the receivership estate from a State Court of competent jurisdiction, thereby materially disrupting if not destroying the orderly function and execution of the State Court and its procedures.

Considerations of comity—the policy of a federal court to avoid friction with a State Court in the administration of justice—and federalism lead this Court to believe that it should not interfere with the orderly function of the State Court.[5] To do otherwise would be to give at the least the appearance of an unseemly and disastrous conflict between the two systems.

It appears to be the settled rule with respect to suits in equity for the control by receivership of the assets of an insolvent corporation that the Court first assuming jurisdiction may maintain and continue to exercise that jurisdiction to the exclusion of any other court. *Penn General Casualty Co.* v. *Pennsylvania,* 294 U.S. 189, 195, 75 L.Ed. 850, 855 (1935). See also *Princess Lida of Thurn & Taxis* v. *Thompson,* 305 U.S. 456, 83 L.Ed.

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[4] A three-judge court pursuant to 28 U.S.C. § 2281 has been requested on the issue of whether or not the statute is unconstitutional. However, it does not appear that such a three-judge court is necessary or called for in this cause.

[5] Though the Court does not address itself to the issues of abstention (28 U.S.C. § 2283), these issues do appear relevant and would possibly further substantiate the Court's decision.

285 (1939); *Gillis* v. *Keystone Mutual Casualty Co.*, 172 F.2d 826 (6th Cir.), *cert.den.* 338 U.S. 822, 94 L.Ed. 499 (1949); *Jacobs* v. *DeShetter*, 465 F.2d 840 (6th Cir. 1972).

This jurisdictional priority principle is buttressed by the case of *Hutchins* v. *Pacific Mutual Life Ins. Co.*, 20 F.Supp. 150 (S.D. Cal. 1937), *affm'd.* 97 F.2d 58 (9th Cir. 1938). In that case prior to any suit being filed in federal court, the State Court vested title of all the assets of an alleged insolvent domestic insurance company in the Insurance Commissioner of California pursuant to his petition. After the State Court—again pursuant to the Commissioner's petition—approved liquidation of the insolvent company on the grounds that conservation was futile, the Commissioner filed a plan of reorganization whereby a new insurance company was to acquire the assets of the insolvent company. The plan, after approval by the State Court, was fully executed.

Subsequently, suit was brought in federal court seeking reconveyance of the assets on the grounds that the entire State proceeding was fraudulent and, therefore, that the State Court lacked jurisdiction. The District Court, in dismissing the federal action, stated:

> "This action, and the one in the state courts, are actions in rem, or, at least, quasi in rem. The relief sought is primarily concerned with the assets in question. The rule in such cases is that the court first acquiring jurisdiction of the res has exclusive jurisdiction." 20 F.Supp. at 152.

See also *Leggett* v. *Green*, 188 F.2d 817 (8th Cir. 1951).

A final point to be noted in this regard is that, if the State procedure is followed to the State Supreme Court, the federal court will ultimately be able to review the federal questions thus preserved. In such situations, the federal court should decline to invoke its jurisdiction out of a sound respect for the in-

dependence and integrity of State action. *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 332-34, 87 L.Ed. 1424, 1434-35 (1943).

In view of the foregoing, this Court is of the opinion that the great confusion and disillusionment in and with the judicial system that would be likely to arise where two separate courts claim and exercise jurisdiction over substantially the same parties, the same series of transactions, the same property, and the same rights warrant one court surrendering to the other. Thus, in keeping with the jurisdictional priority principle, it seems appropriate, as a matter of law,[6] for this Court to decline to hear this cause and for summary judgment in accordance with Rule 56, Federal Rules of Civil Procedure to issue on behalf of the Defendants.

DONE this 24th day of April, 1975.

R. E. Varner
UNITED STATES DISTRICT JUDGE

---

[6]As to matters material to the question of comity, there is no material issue of fact for the Court to determine.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 74-377-N

Willie Allmon, *et al.*,
Plaintiff,

v.

John G. Bookout; *et al.*,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Plaintiff hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Summary Judgment in favor of the Defendants entered in this action on the 24th day of April, 1975.

Jones, Murray, Stewart &
Yarbrough
By: Coleman Yarbrough
P. O. Box 429
Montgomery, Alabama 36101
Attorneys for Plaintiff

OF COUNSEL:
Mr. Scott E. Manley
Mr. M. Paul Solomon

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on Mr. James W. Webb, 138 Adams Avenue, Montgomery, Alabama, 36104, and Mr. Edwin K. Livingston, 32 South Perry Street, Montgomery, Alabama, 36104, Attorneys for Defendants John Bookout, individually, and Charles Payne as Commissioner of Insurance; Mr. Drayton Nabers and Mr. William A. Robinson, Cabaniss, Johnston, Gardner, Dumas & O'Neal, 19th Floor First National Southern Natural Building, Birmingham, Alabama, 35203, Attorneys for Defendants Protective Life Insurance Company, William J. Rushton, III, Thomas K. Pennington, and Ryburn H. Bailey; Charles H. Hunter, pro se, 335 Dexter Avenue, Montgomery, Alabama; Mr. E. R. Alley and Mr. Lampkin Butts, P. O. Box 2744, Laurel, Mississippi, 39440, Attorneys for Defendant Richard M. Goode; Mr. Sidney Lavendar and Mr. Gilbert E. Johnston, of the firm of Johnston, Barton, Proctor, Swedlaw and Naff, Twelfth Floor, Bank for Savings Building, Birmingham, Alabama, 35203, Attorneys for Defendant Paul E. Carr, by mailing a copy of same, through the United States mail, postage prepaid, to their respective offices on this the 24th day of April, 1975.

Coleman Yarbrough
Attorneys for Plaintiff

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2104

Willie Allmon, On behalf of himself and all other persons who presently hold or own Empire Special Executive Plan insurance policies issued by Empire Life Insurance Company of America,

Plaintiffs-Appellants,

John S. Bleker, Jr.,

Plaintiff-Intervenor,

vs.

John G. Bookout, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court for the Middle District of Alabama

---

Before Coleman, Ainsworth and Simpson, Circuit Judges.

BY THE COURT: -

IT IS ORDERED that appellant's motion to expedite appeal is DENIED.

IT IS FURTHER ORDERED that appellant's motion for protective order and motion for injunction pending expedited appeal is DENIED.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2104

Willie Allmon, on behalf of himself and all other persons who presently hold or own Empire Special Executive Plan insurance policies issued by Empire Life Insurance Company of America,

Plaintiff-Appellant,

John S. Bleker, Jr.,

Plaintiff-Intervenor,

vs.

John G. Bookout, *et al.*,

Defendants-Appellees.

MOTION TO DISMISS APPEAL

Come now Protective Life Insurance Company ("Protective"), William J. Rushton, III, Thomas K. Pennington, and Ryburn H. Bailey, appellees in the above cause, and move the Court to dismiss the appeal taken by appellant, Willie Allmon, and as grounds for said motion respectfully show to the Court as follows:

1. The appellant in this cause, Willie Allmon, plaintiff below, appeals from an order entered in C.A. No. 74-377N by District Judge Varner, United States District Court for the Middle District of Alabama, granting summary judgment in appellees' favor. An appeal to this Court was also taken by John S. Bleker, Jr., who was permitted to intervene as a plaintiff by the district court. Bleker's appeal (No. 75-8245), however, was duly

dismissed by this Court on June 24, 1975 pursuant to Fifth Circuit Rule 9(b)(2) for failure to timely docket said appeal. Thus, Allmon's appeal (No. 75-2104) is the sole appeal before this Court from the district court's entry of summary judgment.

2. It affirmatively appears on the face of the complaint as originally filed and as amended that the suit upon which this appeal is based was filed in the name of Willie Allmon, solely in Allmon's capacity as a policyholder of Empire Life Insurance Company of America ("Empire"). [Cmplt. at 1; Amended Cmplt. at 2]. True and correct copies of the original complaint and the amended complaint are attached hereto as Exhibits "1" and "2", respectively. Apart from his status as holder of Empire Special Executive Plan Policy No. 30136 ["ESEP No. 30136"], Allmon has asserted no claim whatsoever against the above-named defendants-appellees, or any of the appellees for that matter.

3. As more particularly appears from the Affidavits of Clarence Melvin Duckett, attached hereto as Exhibits "3" and "3-A", filed in support of this motion, events that occurred subsequent to the entry of the judgment on which the instant appeal is based, render Allmon's appeal moot. The events that mandate the dismissal of this appeal on the grounds of mootness are summarized below and are fully supported by the Duckett affidavit and the exhibits thereto.

(a) By letter dated May 13, 1975, Allmon demanded payment of the cash values of ESEP NO. 30136.

(b) On or about June 5, 1975, pursuant to Allmon's request, Allmon was sent the applicable cash-surrender form and instructed to execute said form if he so desired and to return it with his policy, in order to effect surrender of the policy for its cash values. At this time, Allmon was also advised of the relative disadvantages attendant upon his election to surrender his policy as opposed to his exercising other available options.

(c) On or about August 18, 1975, Allmon was sent further instructions as to the proper method of effecting surrender of his policy.

(d) On or about August 25, 1975, Willie Allmon, and all other persons having an interest in ESEP No. 30136, executed a "Policy Surrender Release Agreement," by the express terms of which Allmon formally elected to claim the cash-surrender value of his policy and surrendered said policy for cancellation and termination. The election to claim the cash-surrender value of the ESEP No. 30136 was asserted by Allmon "in exchange for and in full settlement and in lieu of any and all other rights and benefits of the policy."

(e) Upon receipt of the executed Policy Surrender Release Agreement by Protective on August 27, 1975, ESEP No. 30136 was stamped "CASH SURRENDERED" and Protective's check no. 01297, in full payment of the cash surrender value of said policy ($959.26), was issued payable to Willie Allmon, Sr. As a result of the foregoing, the policy of insurance held by Allmon was in all respects cancelled and the insurance coverage thereunder was terminated.

(f) Shortly after check no. 01297 was issued by Protective in full payment of the cash surrender value of the ESEP No. 30136, William Allmon negotiated said check and, on October 8, 1975, Protective received cancelled check no. 01297 from the Mercantile National Bank at Dallas, the Texas bank on which said check was drawn.

4. As more particularly appears from the affidavit of Thomas K. Pennington, attached hereto as Exhibit "4" and filed in support of his motion, the sum received by Willie Allmon in full payment of the cash surrender value of ESEP No. 30136 ($959.26) represents the total amount due Allmon under the terms of his policy. The amount of said payment was not reduced (or adversely affected in any way whatever) by reason of the reinsurance of the insurance business of Empire by Protective.

5. Based on the occurrence of the foregoing events, it is indisputably clear that Willie Allmon has no legally cognizable interest in the outcome of this appeal because Allmon has voluntarily terminated his status as an Empire policyholder and no longer claims any interest whatever in ESEP No. 30136.

WHEREFORE, appellees, Protective Life Insurance Company, William J. Rushton, III, Thomas K. Pennington, and Ryburn H. Bailey, respectfully move the Court to dismiss the appeal taken by Willie Allmon on the grounds that disposition of said appeal cannot affect any rights of Willie Allmon, and said appeal seeks a mere advisory ruling from this Court that the District Court below erred in entering summary judgment in appellees' favor.

Respectfully submitted,

Drayton Nabers, Jr.

William A. Robinson

Attorneys for Protective Life Insurance Company, William J. Rushton, III, Thomas K. Pennington, and Ryburn H. Bailey.

Of Counsel:

Cabaniss, Johnston, Gardner,
Dumas & O'Neal
1900 First National-Southern
Natural Building
Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Dismiss Appeal and supporting papers have been served upon the following, by first class, United States Mail, postage prepaid and properly addressed as follows: James W. Webb, 138 Adams Avenue, Montgomery, Alabama 36104; Edwin K. Livingston, 32 South Perry Street, Montgomery, Alabama 36104; E. R. Alley and Lampkin Butts, P.O. Box 2744 Laurel, Mississippi 39440; Edward Still, 321 Frank Nelson Building, Birmingham, Alabama 35203; Gilbert E. Johnston and Sydney Lavender, Johnston, Barton, Proctor, Swedlaw and Naff, Bank for Savings Building, Birmingham, Alabama 35203.

Dated this 9th day of October, 1975.

William A. Robinson
Of Counsel

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2104

William Allmon, On behalf of himself and all other persons who presently hold or own Empire Special Executive Plan insurance policies issued by Empire Life Insurance Company of America,

Plaintiffs-Appellants,

John S. Bleker, Jr.,

Plaintiff-Intervenor,

vs.

John G. Bookout, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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Before Coleman, Ainsworth, and Simpson, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss the appeal is DENIED without prejudice, the appeal is vacated, and the cause is remanded to the District Court for appropriate findings of fact and conclusions of law, after an adversary hearing, as to whether the present appeal has been mooted.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 74-377-N

Willie Allmon, Etc.,
Plaintiff,

vs.

John G. Bookout, Individually, *et al,*
Defendnats.

ORDER

There is now presented the Plaintiff's motion for protective order filed herein December 18, 1975. The Plaintiff is seeking to have the Court enter a protective order forbidding all parties before this Court and forbidding the Circuit Court of Jefferson County, Alabama, from taking any action to restrict the participation by any attorneys retained by Plaintiff in the present litigation; to prohibit any interference, direct or indirect, including requiring any attorney representing Allmon to cease representing any other client or requiring any client of said attorneys to cease employment of such attorneys or be subject to a penalty.

In effect, the Plaintiff is seeking "protection" from an order issued by Judge Barber, Circuit Court Judge for Jefferson County, on January 6, 1975. This order and injunction was entered in the State Court receivership proceedings relating to Empire Life Insurance Company. The major part of the order reads as follows:

"It is ORDERED, ADJUDGED and DECREED that

"(1) any and all policyholder, stockholders and agents, present or former, of Empire Life Insurance Company of America, and

"(2) Shearn Moody, Jr., his officers, agents, servants, employees and attorneys (including, but without limitation, Donald L. Collins, A. Eric Johnston, Dale R. Major, Scott E. Manley, A. R. Schwartz, and Thomas R. Beach), and those persons in active concert or participation with any of the foregoing be permanently restrained and enjoined from filing, financing, sponsoring, initiating, or aiding, in whole or in part, in any way the filing of any lawsuit, complaint or legal claim, or any amendment to any complaint or legal claim in any court wheresoever located on behalf of any party whatsoever against:

"(1) John G. Bookout, as an individual;

"(2) John G. Bookout as Receiver of Empire Life Insurance Company of America, his officers, agents, employees and attorneys;

"(3) the Ancillary Receivers of Empire Life Insurance Company of America, their officers, agents, employees and attorneys;

"(4) Protective Life Insurance Company, its officers, agents, employees and attorneys; or

"(5) any other person or legal entity which lawsuit or claim relates to or affects directly or indirectly:

"(a) the affairs of Empire Life Insurance Company of America;

"(b) its receivership;

"(c) its Receiver;

"(d) the Treaty of Assumption and Bulk Reinsurance, as amended, between the Receiver and Protective Life Insurance Company; or

"(e) the implementation of any order or decree of this Court in this proceeding, unless such policyholders, stockholders or agents or said Shearn Moody, Jr., his officers, agents, servants, employees and attorneys and those persons in active concert or participation with them shall first receive the prior approval of this Court."

After a pleading was filed in the present case, Judge Barber issued an order on April 30, 1975, holding Shearn Moody in contempt for violating the injunction. The order provided that Moody could purge himself of contempt by, *inter alia,* discharging any and all attorneys presently employed, directly or indirectly, by or on behalf of Moody, whose employment is or has in any way related to the filing in the present action. The penalty for failing to purge himself of contempt was $5,000.00 per day fine. Those attorneys representing both Allmon and Moody chose to withdraw from the case in this Court.

Although Plaintiff's motion is seeking a "protective order", the Court is unaware of any effective relief, other than injunctive relief, that would be applicable in this particular situation.

After the present case was remanded by the Fifth Circuit Court of Appeals for a determination of whether Plaintiff's claim is now moot, Judge Barber modified the original injunction by entering an order on December 16, 1975, which stated that no action will be taken to interfere with Willie Allmon's active and full participation in the proceedings on the mootness question. Thus, it is clear that Allmon is no longer being restrained from proceeding in this Court. The question that remains is whether it would be proper for this Court to enjoin a State Court injunction and contempt order that have restricted the participation of a number of attorneys retained by Willie Allmon in the present action. It should be pointed out that the

Alabama Supreme Court has recently held that Judge Barber's injunction was properly issued pursuant to Title 28 A, § 624(2), Code of Alabama. That statute allows a receivership court to enjoin the commencement or prosecution of any actions that will unduly interfere with the receivership proceedings pending in that court. *Shearn Moody* v. *State of Alabama,* S.C. 1269, February 27, 1976.

Defendants contend, *inter alia,* that this Court is prevented from interfering with State Court proceedings by the so-called Anti-Injunction Statute, 28 U.S.C. § 2283:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by an Act of Congress, or where necessary in the aid of its jurisdiction, or to protect or effectuate its judgments."

Plaintiff's position is that § 2283 is non-jurisdictional and no more than a statutory enactment of the principle of comity between State and federal courts[1] and that this principle should give way in extraordinary cases when it is necessary to vindicate clear First Amendment rights. *Machesky* v. *Bizzell,* 414 F.2d 283 (5th Cir. 1969). Furthermore, Plaintiff argues that the present action was brought under 42 U.S.C. § 1983 and that it is well established that an action brought under § 1983 is included within the specific exception to § 2283 as an expressly authorized Act of Congress, *Mitchum* v. *Foster,* 407 U.S. 225 (1972). This Court agress that § 2283 does not absolutely bar the issuance of an injunction in the context of the present case. In recognizing that the anti-injunction statute is not an absolute bar to the is-

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[1] This Court does not accept the broad statement that 28 U.S.C. 2283 is a mere principle of comity. See *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286-287 (1970); *International Association of Machinists & Aerospace Workers* v. *Nix,* 512 F.2d 125, 129 (5th Cir. 1975).

suance of an injunction in a § 1983 case, the Supreme Court in *Mitchum* v. *Foster, supra,* noted that the traditional principles of equity, comity and federalism should still be strongly considered in such a case.

Let us now assume, *arguendo,* that the Plaintiff has met the procedural prerequisites for the relief sought.[2] The question now becomes whether the present situation warrants the drastic action sought by the Plaintiff. In the interest of the principles of equity, comity and federalism, this Court recognizes that a State Court should be enjoined only in the most extraordinary circumstances. *Machesky* v. *Bizzell, supra.* The anti-injunction statute is to be ignored only in the face of the most compelling reasons, instances where grave and irreparable injury must be avoided. *Baines* v. *City of Danville,* 337 F.2d 579 (4th Cir. 1964), *cert. den.* 381 U.S. 939. It is the opinion of this Court that such extraordinary circumstances do not exist here. The Plaintiff has argued that the right to free access to the federal tribunals is "one of the highest and most essential privileges of citizenship." *Chambers* v. *Baltimore & Ohio Railroad Co.,* 207 U.S. 142, 148 (1907). However, it is important to remember that the Plaintiff himself is no longer precluded from pursuing his action in federal court. Willie Allmon has free access to this Court, and it is the intention of the Court to preserve this right.

Plaintiff contends that the State Court order gravely impairs the effective prosecution of his case. Plaintiff's present attorney of record, Mr. Edward Still, has stated to this Court that he was

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[2] As previously stated, it is apparent that the only appropriate relief is injunctive relief. Plaintiff has raised the point that the requirements of Rule 65, Federal Rules of Civil Procedure, have not been met, and, thus, an injunction may not issue. The Court feels that it should reach the merits of the issue raised by the present motion and openly decide a question that has impeded the progress of this case.

retained for the purpose of representing Allmon on appeal and is, therefore, unfamiliar with the intricacies of the proceedings at this level. It is true that this case and related actions are fairly complicated; however, the sole issue presently before this Court is whether Willie Allmon's claim has become moot. The question of mootness arose after Mr. Still's entrance into the case. In view of the fact that this is the sole issue to be litigated in this forum, there is no reason to believe that the Plaintiff will not be amply represented or that Mr. Still is operating under any disadvantage.

Plaintiff has cited the case of *Donovan* v. *City of Dallas,* 377 U.S. 408 (1964), as being supportive of his position. In that case, a group of Dallas citizens sought to restrain the city from building an additional runway at the municipal airport and from selling municipal bonds for that purpose. The suit was filed in Texas State Court and summary judgment was granted for the city. The Texas Supreme Court denied review. Subsequently, a larger group, including some of the plaintiffs in the State Court case, filed an action in federal district court seeking relief against the City of Dallas and a number of new defendants. Under Texas law, the bonds could not be issued as long as their validity was being challenged in the Courts. After the suit was filed in federal court, the city sought a writ of prohibition to bar the plaintiffs from prosecuting the action in federal court. The Texas Supreme Court ruled that such a writ should be issued, and the lower court promptly entered an order enjoining the plaintiffs in the federal court case, individually and as a class, from filing or instituting any further litigation relating to this matter. The action was then dismissed in federal district court, and an appeal was filed in the Fifth Circuit Court of Appeals. The plaintiffs were then held in contempt of the State Court injunction. The United States Supreme Court held "that state courts are completely without power to restrain federal court proceedings in *in personam* actions ***." (At 377 U.S. 413).

Although in some ways the *Donovan* case is factually analogous to the present situation, it is inapposite for two reasons. First and foremost, in *Donovan* the plaintiffs themselves were enjoined from prosecuting their case in federal court, while in the present case Allmon is no longer denied access to federal court. Secondly, this Court has previously decided that a receivership action in State Court involving an insolvent insurance company is an action *in rem,* or at least *quasi in rem,* and, therefore, under the jurisdictional priority rule, the court first assuming jurisdiction (in this case, the State Court) may maintain and continue to exercise that jurisdiction to the exclusion of any other court. See Memorandum Opinion entered in this cause on April 24, 1975. In *Donovan,* the Supreme Court stated:

> "Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. This rule has remained substantially unchanged to this time. An exception has been made in cases where a court has custody of property, this is, proceedings *in rem* or *quasi in rem.* In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida* v. *Thompson,* 305 U.S. 456, 465-568." At 377 U.S. 412.

Thus, it is clear that *Donovan* is not applicable to the present case.

In concluding that § 1983 is an Act of Congress that falls within one of the exceptions of the anti-injunction statute, the Supreme Court stated in *Mitchum* v. *Foster, supra:*

> "*** (W)e do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin state court proceedings. *** They are principles that have been emphasized by [the Supreme] Court many times in the past. *Fenner* v.

Boykin, 271 U.S. 240; *Spielman Motor Sales Co.,* v. *Dodge,* 295 U.S. 89; *Beal* v. *Missouri Pac. R. Co.,* 312 U.S. 45; *Watson* v. *Buck,* 313 U.S. 387; *Willias* v. *Miller,* 317 U.S. 599; *Douglas* v. *City of Jeannette,* 319 U.S. 157; *Stefanelli* v. *Minard,* 342 U.S. 117; *Cameron* v. *Johnson,* 390 U.S. 611." At 407 U.S. 225.

This situation, as it presently exists, does not warrant the Court's intrusion into the orderly function of the State Court. Consideration of comity and federalism compel this Court to deny Plaintiff's motion for protective order. Accordingly, it is

ORDERED by this Court that said motion for protective order be, and the same is hereby, denied.

DONE this 24th day of March, 1976.

R. E. Varner
United States District Judge

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 74-377-N

Willie Allmon, Etc.,
Plaintiff,

vs.

John G. Bookout, Etc.; *et al,*
Defendants.

JUDGMENT

Pursuant to the Memorandum Opinion entered by this Court in the above-styled cause on the 28th day of June, 1976, it is

ORDERED, ADJUDGED and DECREED by this Court that the above-styled cause be, and the same is hereby, dismissed with costs of the proceeding on remand taxed against the Plaintiff, Willie Allmon, for which execution may issue.

DONE this 28th day of June, 1976.

R. E. Varner
United States District Judge

MEMORANDUM OPINION

Pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit, this cause came on for adversary hearing on May 14, 1976, on the question of whether this case has been mooted. This Court, having heard the testimony of witnesses and having considered all evidence submitted at said

hearing and the arguments of counsel, hereby finds the facts and states separately its conclusions of law thereon and directs the entry of the appropriate judgment as follows.

Findings of Fact

1. The complaint in this action was filed in the name of Willie Allmon, solely in Allmon's capacity as a policyholder of Empire Life Insurance Company of America (hereinafter "Empire").

2. Until late August, 1975, Allmon was the owner and primary beneficiary of Empire Special Executive Plan Policy No. 30136 (hereinafter "ESEP No. 30136" or "Allmon Policy").

3. Pursuant to the terms of a reinsurance plan (hereinafter called the "Protective Treaty"), approved by a State receivership court, Protective Life Insurance Company (hereinafter "Protective") assumed liability under ESEP No. 30136.

4. Allmon has received all benefits authorized by his policy which he has sought.

5. As of September 15, 1972, the Allmon policy had no withdrawable funds, i.e., said policy had a negative net cash value, as a result of loans sought and obtained by Allmon under the terms of ESEP No. 30136.

6. As Allmon had no withdrawable funds as of the effective date of the moratorium imposed by the Protective Treaty, the Protective Treaty works no injury or damage to Allmon.

7. ESEP No. 30136 provides, in pertinent part, that:

> "The policy may be surrendered for cash value in accordance with the Table of Values, less any indebtedness to the Company on this Policy."

8. On or about August 25, 1975, Willie Allmon and all other persons having interest in ESEP No. 30136 voluntarily executed

a policy surrender release agreement with respect to said policy and, thereby, exercised the foregoing contractual right to surrender ESEP No. 30136.

9. Allmon intentionally and voluntarily surrendered ESEP No. 30136, and the sequence of events that culminated in cancellation of said policy occurred without overreaching on the part of Protective or any other Defendant.

10. No misrepresentations were made by or on behalf of Protective in connection with the surrender of ESEP No. 30136, and there was no scheme to induce Allmon to surrender said policy.

11. The executed policy surrender release agreement and the original Allmon policy were submitted to Protective, and said policy was stamped "CASH SURRENDERED", and Protective's check No. 01297 in the amount of $959.26 was mailed to Willie Allmon.

12. Thereafter, Allmon promptly negotiated said check, and the check was subsequently paid by the drawee bank.

13. The sum received by Allmon in full payment of the cash surrender value of ESEP No. 30126 ($959.26) represents the total amount due Allmon under the terms of said policy. The amount of said payment was not adversely affected by the Protective Treaty, as amended.

Conclusions of Law

1. Allmon's election to claim the cash surrender value of ESEP No. 30136, in exchange for and in full settlement of all rights and benefits provided in the policy, worked a complete termination of Allmon's status as a policyholder and simultaneously mooted the controversy between Willie Allmon and the Defendants.

2. The class of former Empire policyholders which Willie Allmon purports to represent has not yet been certified, and in light of the fact that the controversy between Allmon and the Defendants has been mooted, this Court finds that it would be impossible for Willie Allmon to fairly and adequately protect the purported class since he is no longer a member of the class. Therefore, this prerequisite to a class action is not present. Rule 23(a)(4), Federal Rules of Civil Procedure. Accordingly, the mootness of this suit is unaffected by the class action allegations of the complaint, as amended.

Therefore, an order will be entered dismissing Plaintiff's action at his cost.

DONE this 28th day of June, 1976.

R. E. Varner
United States District Judge